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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 375

WILLIAM H. EDWARDS, COLLECTOR OF INTERNAL REVENUE, SECOND NEW YORK DISTRICT, PETITIONER

v.

CHILE COPPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 47) is reported in 294 Fed. 581.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 55) is reported in 5 F. (2d) 1014.

GROUNDS OF JURISDICTION

This action was brought by the Chile Copper Company to recover $213,188.64, with interest, the amount of capital stock taxes alleged to have been erroneously collected for the years 1917 to 1920,

inclusive. A motion to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action was denied by the District Court, which granted judgment for respondent for the full amount. (R. 50.)

Upon writ of error (R. 1) the Circuit Court of Appeals affirmed the judgement in a memorandum opinion stating merely that the judgment of the court below was affirmed (R. 55). From the judgment of the Circuit Court of Appeals, entered on February 24, 1925 (R. 55), the case was brought to this Court by petition for a writ of certiorari filed April 21, 1925, which petition was granted May 25, 1925 (268 U. S. 685).

QUESTION PRESENTED

Was the Chile Copper Company during the years 1917 to 1920, inclusive, "carrying on or doing business" within the meaning of Section 407 of the Revenue Act of 1916 and Section 1000 of the Revenue Act of 1918, which impose on corporations a special excise tax with respect to doing business, based on the amount of their capital stock?

The courts below held that it was not. The Government claims that this holding is erroneous.

THE FACTS

The Chile Copper Company is a corporation of the State of Delaware, with capital stock outstanding of the par value of $95,000,000. (R. 2.)

The Chile Exploration Company is a corporation of the State of New Jersey, with capital stock outstanding of the par value of $1,000,000. Its principal business has been the mining of copper from property owned by it in the Republic of Chile. Since its incorporation the Chile Exploration Company could not at any time have developed its mining property without borrowing large sums of money. In order to borrow the necessary money it would have been necessary to sell bonds or other obligations secured by mortgage upon its property. The laws of Chile, however, provided that mining property in that country could not be sold for debt so as to vest title thereto in creditors. Thus the Chile Exploration Company would be prevented from effectively mortgaging its mining property so as to secure an issue of its obligations, and unsecured obligations would not have been salable in investment markets. (R. 2–3.)

To meet this difficulty the Chile Copper Company, the respondent, was organized for the main purpose of providing a means whereby money could be borrowed from investors in sums sufficiently large to develop property of the Chile Exploration Company. Respondent accordingly was organized on April 16, 1913, to hold the capital stock of the Chile Exploration Company and pledge such stock as security for bond issues, the proceeds of which should be used, loaned, and advanced from time to time to furnish the necessary

capital to develop the mining property of the Chile Exploration Company. (R. 3.)

At all times mentioned in the complaint respondent owned all the stock of the Chile Exploration Company (R. 3), and on April 1, 1917, it pledged that stock to the Guaranty Trust Company under an agreement between itself, the Trust Company and the Chile Exploration Company as security for an issue of bonds (R. 4).

The trust agreement provided, among other things, that the proceeds of the bonds should be used only to pay off certain existing indebtedness and for the acquisition, construction, or improvement of property necessary or useful in connection with the mining, refining, or marketing of copper or copper ore derived from the property owned by the Chile Exploration Company. (R. 3.)

In addition, a certain other issue of bonds made in the year 1913 was still outstanding in the year 1917. (R. 3.)

The respondent alleges (R. 3, par. VII *et seq.*) that during the period from January 1 to June 30, 1917, its activities "without any omissions or exceptions, consisted solely of the following." These activities are then set forth at length and may be summarized as follows:

(1) Stockholders' and directors' meetings were held, directors and officers were chosen, corporate books and accounting records were kept, and an office was maintained and whatever was necessary to

maintain the corporate existence and organization was done. (R. 3.)

(2) Respondent owned and voted the entire capital stock of the Chile Exploration Company, and thus selected directors of that company, but it did not act as purchasing or selling agent for that company. (R. 4.)

(3) It paid the interest on $15,000,000 worth of bonds secured by a pledge of the entire capital stock of the Chile Exploration Company, the proceeds of which had been paid to that company as an additional investment in that company. It authorized a further issue of bonds of the par value of $100,000,000 to be secured by a pledge of the entire stock of the Chile Exploration Company, and executed an appropriate trust agreement. It executed an agreement with underwriters and issued bonds of the par value of $35,000,000. It received payment upon said bonds from subscribers, which was deposited in a special account with the Guaranty Trust Company, and it paid the expenses of the bond issue and made provision for the accrued interest payable upon the bonds. (R. 4.)

No part of the proceeds of the bond issue was used to pay the floating indebtedness of the Chile Exploration Company or for the acquisition of property by respondent; but the entire proceeds were used to pay the floating debt of respondent or were advanced or held for future advance to the Chile Exploration Company. (R. 5.)

(4) Respondent received from the Chile Exploration Company payments of interest upon loans previously made, and also payments on account of a dividend, and interest-bearing notes in payment of previous loans and of a portion of the bond discount incurred in marketing the 1917 bond issue. (R. 5.)

(5) It made loans on open account to the Chile Exploration Company. (R. 5.)

(6) It furnished to the Guaranty Trust Company statements showing the application of the proceeds of checks drawn against the proceeds of the bond issue. (R. 6.)

The activities of respondent for the succeeding years 1918, 1919, and 1920 are set forth under the different causes of action for each year, and they do not differ materially from those just summarized.

The amount advanced by respondent to the Chile Exploration Company for the year ending June 30, 1917, was $1,250,000. (R. 6.) For the year 1918 it was $3,500,000. (R.11.) For 1919 it was $7,136,000. (R. 15.) For 1920 it was $700,000. (R. 22.)

In addition, respondent invested some of its surplus funds received from the bond issue in Liberty Bonds. (R. 22.) It also loaned a large amount of said surplus on call loans through the Guaranty Trust Company and the Central Union Trust Company. During the year ending June 30, 1920, 224 loans, aggregating $37,200,000, were made, and 180

loans, aggregating $29,100,000 were called or paid. During the year ending June 30, 1920, respondent received $332,366.90 interest on said loans. (R. 23.) During the year ending June 30, 1919, a portion of its surplus funds was invested in Liberty Bonds and United States Certificates of Indebtedness, and 141 call loans aggregating $26,045,000 were made, upon which it received interest amounting to $194,579.20. (R. 16.)

The Government claims that these activities constituted doing business within the meaning of Section 407 of the Revenue Act of 1916 and Section 1000 of the Revenue Act of 1918, and that the courts below erred in holding otherwise.

STATUTES INVOLVED

Section 407 of the Revenue Act of 1916 (39 Stat. 756, 789, ch. 463), so far as relevant, provides as follows:

> That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:
>
> Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-

stock company or association, or insurance company, equivalent to 50 cents for each $1,000 of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included: * * * *And provided further,* That this tax shall not be imposed upon any corporation, joint-stock company or association, or insurance company not engaged in business during the preceding taxable year * * *.

Section 1000 of the Revenue Act of 1918 (40 Stat. 1057, 1126, ch. 18), so far as relevant, provides as follows:

(*a*) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

* * * * *

(*c*) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States) during the preceding year ending June 30 * * *.

SPECIFICATION OF ERROR TO BE URGED

The court erred in holding that the above-enumerated activities of the Chile Copper Company for the years 1917 to 1920, inclusive, did not constitute " carrying on or doing business " within the meaning of Section 407 of the Revenue Act of 1916 and Section 1000 of the Revenue Act of 1918, *supra*.

ARGUMENT

SUMMARY

The Chile Copper Company was doing business during the years 1917 to 1920, inclusive, within the meaning of Section 407 of the Revenue Act of 1916 and Section 1000 of the Revenue Act of 1918.

(*a*) The rule announced by the decisions of this Court.

(*b*) Application of the rule announced by this Court to the facts in the case at bar.

(*c*) The decisions of United States Circuit Courts of Appeals and District Courts.

THE CHILE COPPER COMPANY WAS DOING BUSINESS DURING THE YEARS 1917 TO 1920, INCLUSIVE, WITHIN THE MEANING OF SECTION 407 OF THE REVENUE ACT OF 1916 AND SECTION 1000 OF THE REVENUE ACT OF 1918

The error of the courts below chiefly consists in failing to apply to the particular facts in the case at bar a correct interpretation of the rulings of this Court on what constitutes doing business within the purview of the taxing statutes.

To understand the decisions, it should be borne in mind that the tax under consideration is an excise upon the particular privilege of doing business in a corporate capacity, *i. e.,* with the advantages which arise from corporate organization. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107.

While the tax does not fall on the possession of the privilege unless it is exercised—and that is why the statute provides that *some* business must be done in order that the privilege be subject to the tax—nevertheless the extent to which the privileges incident to corporate organization may be exercised is not important, so long as there is some substantial use of them.

The question of what constitutes doing business has been before this Court several times in cases arising under the Corporation Excise Tax Act of 1909 (36 Stat. 11, 112, ch. 6). That Act imposed " a special excise tax with respect to the carrying on or doing business " by a corportion. It taxed only corporations " organized for profit " and measured the tax by the net income received from certain sources. The capital stock taxes imposed by the Revenue Acts of 1916 and 1918, although measured by a different standard and in the 1918 Act not limited to corporations organized for profit, nevertheless are levied upon the same business activities as were taxed by the Corporation Excise Tax Act of 1909. The decisions of this Court, therefore, on what constitutes doing business under the 1909 Act

are equally applicable to cases arising under the capital stock provisions of the Revenue Acts of 1916 and 1918 here under consideration.

(*a*) THE RULE ANNOUNCED BY THE DECISIONS OF THIS COURT

The first ruling by this Court on the scope of the term " doing business " as used in the 1909 Act was made in the *Corporation Tax Cases.* Three of those cases decided *sub nomine Flint* v. *Stone Tracy Company,* 220 U. S. 107, were the *Park Realty Company,* the *Broadway Realty Company,* and the *Clark Iron Company cases.* Each of these companies was held to be doing business. The Park Realty Company was organized with wide powers to deal in real estate by buying, selling or leasing lands and buildings and by erecting, conducting, managing or leasing hotels, etc. At the time of the imposition of the tax, however, the company had leased the single hotel owned by it, for a period of 21 years, at an annual rental of $55,000, and was engaged in no business other than the management and leasing of that hotel and was in receipt of no income other than the rental therefrom. The Broadway Realty Company was formed for the purpose of owning, holding and managing real estate. It owned an office building and some securities. The office building was let to tenants to whom light, heat and janitor service were furnished. As shown by the bill of complaint in the case, the Clark Iron Company was formed to own

and hold real estate. Its sole property was certain land upon which it had discovered iron ore. At the time of the imposition of the tax the Clark Iron Company had leased its ore lands to other parties or corporations and was engaged in no other business than the receiving of royalties from the leased property and such activities as were necessary to defend its title to such property. In holding that these companies were doing business this Court said (p. 171):

> "Business" is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing *People* v. *Commissioners of Taxes*, 23 N. Y. 242, 244. "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit." Bouvier's Law Dictionary, Vol. I, p. 273.
>
> We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, *making investments of profits*, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases *investing the surplus*, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law. (Italics ours.)

It is important to bear in mind that the paragraph last quoted is a cumulative description of the activities of all the realty companies under

consideration and therefore is not to be taken to mean that any one company must indulge in all or several of the enumerated activities in order to be doing business. The doing of *any one* of the things enumerated was apparently considered sufficient to bring the corporation within the terms of the statute. Furthermore, it is important to note that in the Stone Tracy Company decision this Court not only expressly recognized *making investments* as doing business, but also clearly held the general view that corporations organized for the purpose of doing business and engaged in the activities for which organized, were doing business.

On the same day this Court decided the case of *Flint* v. *Stone Tracy Company, supra,* it also decided the case of *Zonne* v. *Minneapolis Syndicate,* 220 U. S. 187, holding that the Minneapolis Syndicate was not doing business. This ruling, superficially viewed, is often cited as at variance with the general proposition that an active corporation engaged in the activities for which organized must be regarded as doing business. It will be well, therefore, carefully to scan the case.

At the outset this Court remarked that the *Minneapolis Syndicate case* "presents a peculiarity of corporate organization and purpose not involved in the case just decided" (*Flint* v. *Stone Tracy Company*). It appeared that the Minneapolis Syndicate was *originally organized to engage in the business of letting stores and offices in a building owned by it* and was engaged in that business up

to December 27, 1906. On that date it leased all of its property for a term of 130 years and at the same time caused its articles of incorporation to be amended so as to limit its activities to the mere holding of title to a single piece of property subject to the lease and "for the convenience of its stockholders" to receive and distribute rentals that might accrue under the lease and the proceeds of any disposition of the land. This Court, after stating that the Minneapolis Syndicate "*as originally organized* and owning and renting an office building, *was doing business,*" went on to say, however (p. 190), that—

> * * * the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. *It had wholly parted with control and management of the property;* its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold. *The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of reorganization from any activity in respect to it.* (Italics ours.)

Thus the principle upon which the Minneapolis Syndicate was held not to be doing business was that it had retired from the business for which it was organized and was engaged merely in the

ownership of the property and the distribution of the avails of its lease.

The next case decided was that of *McCoach* v. *Minehill Railroad Company,* 228 U. S. 295. There the Minehill Company, which was organized to engage in the railroad business and which had been engaging in that business, leased its properties to another corporation for a term of 999 years, and since such lease had not carried on any business in connection with the operation of the properties. The Minehill Company merely maintained its corporate existence, elected officers, received rentals from the leased premises, received interest from bank balances, maintained a " contingent fund " in the form of investments (*the amount and particulars of which were not specified*), received interest and dividends from such invested funds and distributed the same among its stockholders. During the term of the lease the company was also to exercise its corporate powers when requested by the lessee in order to enable the latter to enjoy all its rights and privileges with respect to the property demised. This Court concluded from these facts (p. 303)—

> that the Minehill Company was not, during the years of 1909 and 1910, engaged at all in the business of maintaining or operating a railroad, *which was the prime object of its incorporation.* This business, by the lease of 1896, it had turned over to the Reading Company. (Italics ours.)

This was apparently the principal ground of the decision—that the company was not doing the business for which it was organized, but had gone out of business with respect thereto. The Court expressly refused to pass upon the question as to whether the company would have been doing business had it exercised the power of eminent domain, or put in force any other special corporate power in aid of the business of the lessee. The Court said (p. 305):

> It should be mentioned that there is nothing in the record to show that during the taxing years in question the company exercised its power of eminent domain, or put in force any other special corporate power, in aid of the business of the lessee. *We therefore do not pass upon the question whether, if it should do so, it would be taxable under the act in question.* (Italics ours.)

It is not believed that the case of *McCoach* v. *Minehill Railroad Company, supra,* militates against the conclusion that the Chile Copper Company was here doing business. While the Court there held that the receipt of interest from bank deposits and investments, the particulars of which were not disclosed, did not constitute doing business by the Minehill Company, it is clear that the reason therefor was that those activities under the particular circumstances of the case were regarded as merely incidental and not a part of the main

business of the company—a purely passive preservation of its property or funds. The Court did not hold that the *making of investments* does not constitute doing business. It does not appear that any contention was made that the Minehill Company was *making investments* during the years in suit. It is simply said that the company *received from investments which it maintained* an annual income distributed by it. There is quite a distinction between *maintaining* investments (which, so far as the record discloses, may already have been made) and the *making* of investments—that is, new investments—which is the case here.

Following the *Minehill case,* this Court next decided the case of *United States* v. *Emery, Bird, Thayer Realty Company,* 237 U. S. 28. In that case the stockholders of a drygoods company organized a real estate company, which took over the lands of the drygoods company and leased them back to the drygoods company, *the latter having the management of the property and assuming the responsibilities in respect to it.* Although the company did what it was organized to do, its functions were purely passive, and it was held not to be doing business. However, the decision of the Court was expressly founded on the proposition that the reality company acted merely as an *intermediary*—a mere conduit pipe—in the business of the drygoods company, the stockholders of both companies

being substantially the same. At the close of its opinion the Court said (p. 32):

> *The claimants' characteristic charter function and the only one that it was carrying on was the bare receipt and distribution to its stockholders of rent from a specified parcel of land. Unless its bare existence as an intermediary was doing business, it is hard to imagine how it could be less engaged.* (Italics ours.)

This decision simply follows the principle previously laid down that the mere ownership of property subject to a lease, the receipt of rentals therefrom without participation in the use or operation of the property, and the distribution of such rentals to stockholders, do not constitute doing business. As in the *Minehill case, supra,* there is nothing in this decision to justify holding here that the activities of the Chile Copper Company in selling its bonds, loaning money on call, making investments, furnishing working capital to another corporation whose capital stock it owned, seeing that the proceeds from the sale of its bonds were appropriately applied in accordance with certain agreements, and the doing of the other things necessary to the performance of those functions, do not constitute doing business. This Court has certainly never carried the doctrine of exemption that far.

The last decision rendered by this Court on what constitutes doing business was in the case of *Von Baumbach* v. *Sargent Land Company,* 242 U. S.

503. The mining corporations whose activities were under consideration in that case had leased most of their properties, but were still engaged in such activities as employing another company to see that the lessees lived up to the engagements in their contracts, making explorations and digging test pits on the leased premises, selling stumpage on burnt-over timber lands, and leasing and selling lots. All such corporations were held to be doing business. After reviewing all its former decisions (which we have just discussed), the following test for the determination as to whether or not a corporation was doing business was laid down by this Court (p. 516):

> The fair test to be derived from a consideration of all of them is between a corporation which has *reduced its activities* to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and *is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes.*
>
> From the facts clearly established in these cases, we think these corporations were doing business, within the meaning of the act. They were organized for the purposes stated, *and their activities included something more than the mere holding of property and the distribution of the receipts thereof.* (Italics ours.)

In passing, it may be noted that while there was a dissenting opinion in the *Minehill case, supra,* the decision in the *Von Baumbach case* was rendered by a unanimous court, and was intended to mark out the limit of the doctrine of exemption announced in its prior decisions, and serve to guide the courts in future cases involving the question of doing business.

(B) APPLICATION OF THE RULE ANNOUNCED BY THIS COURT TO THE FACTS IN THE CASE AT BAR

Applying the rules of the above cases, it is evident that the Chile Copper Company was doing business—was "maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes" (*Von Baumbach case*). The purpose of its organization was to do all those things essential to the continued operation of the Chile Exploration Company, because the latter company would otherwise have been unable to operate effectively. It has been carrying out that purpose to the fullest extent. It secured capital by borrowing money upon its bonds and conducted negotiations to that end; procured appropriate agreements and did all else necessary to make the bonds salable. Thereafter it saw that the proceeds of the bonds were applied in accordance with the agreement made between itself, the Chile Exploration Company and the trustee. Under the terms of

the agreement it was not only the manager of the funds raised by the sale of the bonds and supervisor of the spending of the money and its distribution to the Chile Exploration Company, but it also pledged its property to carry out the object of its incorporation.

In a sense it might be said that the Chile Copper Company became financial agent for the Exploration Company. Yet that would hardly be accurate, for, considering the practical realities of the relationship, the Exploration Company should rather be regarded as the agent of the Chile Copper Company. The entire control of the operations of the Exploration Company was in the Chile Copper Company through its ownership of all the stock of the Exploration Company. It thus selected the directors and officers of that company. It procured and advanced the working capital and to that end pledged its credit and mortgaged its property. It obligated itself to see that the money thus raised was used in accordance with the agreement made with those who bought the bonds. Thus all throughout the Chile Copper Company was the active, not the passive, party. While it is true that in strict contemplation of law the Exploration Company could hardly be said to be the agent of the Copper Company, nevertheless the latter company was the *sine qua non* to the effective operation of the former, the arbiter of the necessities of its business and the recipient of the profit therefrom.

In brief, it furnished the money and directed the work of that money through the Exploration Company. Can all that this entails be said not to constitute the doing of business?

Yet it did even more. In addition to the above activities, the Chile Copper Company was actively engaged in another special line of business—the business of loaning money on call to outsiders and the making of investments with its surplus funds in United States securities.

Can it be said that a company which borrowed huge sums of money to pay its own floating indebtedness and to furnish the working capital for another company; which was loaning millions of dollars in the money market and which received by way of interest on such loans in one year over $300,000, to recount no other of respondent's activities, had "practically gone out of business" and "disqualified itself by the terms of reorganization from any activity in respect to it" (the *Minneapolis Syndicate case*); or had reduced its activities to the "business of owning the property, *maintaining the investments,* collecting the income, and dividing it among its stockholders" (the *Minehill case;* italics ours); or was a passive "intermediary" doing only that business necessary "to keep up its corporate organization and to collect and distribute the rent received from its single lessee" (the *Emery, Bird, Thayer case*)? Is the Chile Copper Company not rather in every sense

one which is " still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes " (the *Von Baumbach case*)? We contend that it is.

(C) THE DECISIONS OF UNITED STATES CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS

The District Court in its opinion in the case at bar, which was affirmed in a mere memorandum opinion by the Circuit Court of Appeals, refers to and relies upon a number of cases involving the question of " doing business " which have been decided in the lower Federal courts. Respondent in its briefs in the courts below also placed great reliance upon these rulings. We do not deem an extended review of these cases necessary. In the first place, no clearly consistent rule can be gathered from them. While a number of them seem on their face to indicate a reluctance on the part of some of the courts to accept what the Government thinks is the meaning of the decisions of this Court, there are also to be found decisions of other lower courts which seem to support the Government's view. In the second place, so far as we can find (with the exception of *International Salt Company* v. *Phillips,* decided December 10, 1925, by the Circuit Court of Appeals for the Third Circuit, not yet reported, now pending before this Court on petition for writ of certiorari, and *Three*

Forks Coal Company v. *United States,* decided October 29, 1925, by the District Court for the Western District of Pennsylvania, now on appeal before the Circuit Court of Appeals for the Third Circuit) there is no case yet decided which involves facts in any way closely analogous to those in the present case. As said by this Court in the *Von Baumbach case,* it is evident " that the decision in each instance must depend upon the particular facts before the court." Accordingly the case must be determined solely upon the basis of its own facts.

It is submitted, therefore, that the decisions of the lower courts are of no value in the present case so far as they enlarge upon, transcend or conflict with, as many of them do, the principles laid down by this Court in the decisions which we have just reviewed. If this case it to be decided on the basis of a principle announced by decision, the decisions of this Court alone must be the guide.

CONCLUSION

In brief, the Government's contention is that this Court has judicially defined business as " that which occupies the time, attention, and labor of men for the purpose of livelihood or profit," and has made clear its views as to what constitutes doing business by carefully distinguishing between active and inactive corporations. It has never held that the financing and controlling of the operations of another corporation (without which the latter

could not effectively operate), or the making of investments, or loaning money to outsiders, to recount only some of the respondent's activities, do not constitute doing business. On the contrary, the trend is distinctly otherwise. We submit, therefore, that when respondent engaged in those and other activities set out in the record—in all of them actively carrying out the very purpose of its organization—it was "doing business" within the meaning of the decision of this Court in the case of *Von Baumbach* v. *Sargent Land Company*, 242 U. S. 503, and the cases therein cited; it not only possessed, but substantially exercised and enjoyed the privilege of doing business with the advantages arising from corporate organization.

For these reasons, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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FEBRUARY, 1926.

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No. 375.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

WILLIAM H. EDWARDS, Collector of Internal Revenue, Second New York District,

Petitioner,

AGAINST

CHILE COPPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE COMPANY, RESPONDENT.

Opinions of the Courts Below.

This was an action brought by respondent, Chile Copper Company, for the recovery of capital stock taxes, on the ground that respondent was not "carrying on or doing business" within the meaning of the statutes. The District Court so held and gave judgment in favor of respondent. (R. 47, 50.)

Chile Copper Co. v. *William H. Edwards, Collector,* 294 Fed. 581 (S. D. N. Y.) (Judgment dated Dec. 1, 1923, R. 50).

The Circuit Court of Appeals for the Second Circuit affirmed this judgment upon the opinion of the District Court (R. 55).

William H. Edwards, Collector, v. *Chile Copper Co.,* 5 F. (2d) 1014 (Judgment dated Feb. 24, 1925, R. 55).

Grounds of Jurisdiction.

The complaint of Chile Copper Company (hereafter referred to as the Company), filed in the United States District Court for the Southern District of New York, alleged that capital stock taxes for the years 1917 to 1920 had been erroneously collected from it, and that the Company was a holding company owning the entire capital stock of Chile Exploration Company, a mining corporation. The complaint set out the entire activities of the Company during the periods upon which depended any liability to the tax. The United States made a motion to dismiss the complaint upon the ground that it did not state a cause of action. This motion had the effect of a demurrer in admitting the material allegations of the complaint (*Am. Litho Co.* v. *Dorrance-Sullivan Co.,* 241 N. Y. 306, 150 N. E. 125 (1925)). The District Court denied the motion and by agreement of the parties gave judgment for the Company in the amount demanded, viz., $213,188.64, with interest (R. 50). Upon a writ of error (R. 1) the Circuit Court of Appeals for the Second Circuit affirmed the judgment on the opinion of Judge Learned Hand in the District Court (R. 55). The case was brought to this Court by petition of the United States for a writ of certiorari filed April 21, 1925, and granted May 25, 1925 (R. 55; 268 U. S. 685).

Question Presented.

The sole specification of error by the Government is:

"The court erred in holding that the above enumerated activities of the Chile Copper Company for the

years 1917 to 1920 inclusive did not constitute 'carrying on or doing business' within the meaning of Section 407 of the Revenue Act of 1916 and Section 1000 of the Revenue Act of 1918."

The question is, therefore, whether on the facts set forth in the complaint and admitted by the Government's motion to dismiss, this holding was correct.

Statement Regarding Facts.

This case must be decided upon the facts as set forth in the complaint (R. 2-46). These facts have been correctly summarized in the statement of facts made at pages 2-7 of the Government's brief. Attention will be directed below to certain inferences of fact believed not to be warranted by the Record, which are made in the Government's brief (pp. 18-23) in the course of argument.

It may here be noted that the authorization and issuance of bonds by the Company occurred only in the first taxable period involved, viz., January 1, 1917—June 30, 1917 (R. 3). The question presented by the investment of funds in call loans and Liberty Bonds concerns only the fourth taxable period, July 1, 1919—June 30, 1920. The Revenue Act of 1918, Section 1000, provides that the tax shall not apply to any corporation which was not engaged in business during the preceding year ending June 30th. The investments in question were made only during the third and fourth taxable periods (1918-1919; 1919-1920). Since no investments were made during the year preceding the third period, they cannot create any tax liability for the third period. They affect the tax liability of the Company, if at all, only during the last period.

The Statutes Involved.

The Company's liability for capital stock taxes for the first two periods (Jan. 1, 1917—June 30, 1917; July 1, 1917

—June 30, 1918) is governed by Section 407 of the Revenue Act of 1916, the relevant part of which is as follows:

> "Sec. 407. That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:
>
> Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to 50 cents for each $1,000 of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included: * * * *And provided further,* That this tax shall not be imposed upon any corporation, joint-stock company or association, or insurance company not engaged in business during the preceding taxable year, or which is exempt under the provisions of section eleven, Title I of this Act." *Sec. 407, Revenue Act of 1916 (39 Stat. 789).*

The latter two periods (July 1, 1918—June 30, 1919; July 1, 1919—June 30, 1920) fall under Section 1000 of the Revenue Act of 1918, which reads as follows:

> "Sec. 1000. (*a*) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—
>
> (1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30, as is in excess of the $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included; * * *.
>
> (*c*) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corpora-

tion not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231." *Sec. 1000, Revenue Act of 1918 (40 Stat. 1126).*

SUMMARY OF ARGUMENT.

I.

By the language and basis of the law, capital stock taxes are imposed only upon those corporations "carrying on or doing business" in some real and substantial sense. Under the test laid down by this Court, the courts below correctly held that the activities of the Company did not constitute such "business".

II.

The lower Federal courts have uniformly and correctly held that the issuance of bonds by inactive property-owning corporations in aid of operating companies does not constitute "carrying on or doing business."

III.

The capital stock tax laws are not to be construed so as to impose two taxes upon the carrying on or doing of business by a single enterprise.

ARGUMENT.

I.

By the language and basis of the law, capital stock taxes are imposed only upon those corporations "carrying on or doing business" in some real and substantial sense. Under the test laid down by this Court, the courts below correctly held that the activities of the Company did not constitute such "business".

In express terms this tax rests only upon corporations "carrying on or doing business". The statutes expressly exempt corporations not doing so. The mere possession of the right to do business is not enough. There must be an exercise of that right, as the Government admits (Brief, p. 10). Without such exercise there is no basis for the imposition of an excise tax, and the statutes in question would be unconstitutional as imposing a direct tax measured by the fair value of the capital stock without apportionment among the states (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 150 (1911)). It is for this reason, as well as because of the language of the statute, that the phrase "carrying on or doing business" has been held to require some substantial activity or course of dealing, for the sake of profit—in short, to have the ordinary everyday sense of the term "doing business".

As pointed out in the Government's brief, this Court, in five cases decided under the Corporation Excise Tax Act of 1909 (36 Stat. 11, 112, Ch. 6), which also rested upon corporations "carrying on or doing business", has laid down the principles governing the meaning and application of the phrase in question. The courts below did not intend to apply, nor does the Company urge, any test as to what constitutes doing business other than that expressed in those decisions. The most recent of them, *Von Baumbach* v.

Sargent Land Co., 242 U. S. 503 (1917), in summing up the effect of the prior cases, contrasts corporations which merely own and hold property and distribute the avails thereof with those which are still actively engaged in—

> "continued efforts in the pursuit of profit and gain".

In the same vein, the Circuit Court of Appeals for the Third Circuit has recently said (*International Salt Company* v. *Phillips*, December 10, 1925, unreported) that the phrase indicated—

> "positive, aggressive acts, incidental to the active carrying on or doing business for gain".

Similarly, Judge Learned Hand, in the case at bar, stated:

> "The term 'business' means some profitable activity undertaken on its own account" (R. 48).

The Government's brief (p. 19) sets out the language of this Court in the Sargent case, above referred to, and insists that it be applied as the test of the Company's status. The Company agrees, but we believe the Courts below were correct in holding that the Company falls within the class of inactive property owners which cannot be regarded as carriyng on or doing business. The activities of the Company during the years in question (these being set out in full in the complaint as admitted by the Government's motion for judgment) will be found not to include a single "effort in the pursuit of profit", much less "continued efforts".

The Company was organized in 1913, not because Chile Exploration Co. (hereinafter referred to as "Chile Exploration") needed any assistance in the operations of mining or marketing copper, but because by reason of peculiarities of the law of Chile where the mining enterprise is located, Chile Exploration could not effectively mortgage its property to secure more capital for plant and equipment (R. 2, 3, 8, 13, 19). The activities of the Company have been only those necessary to fulfill the purpose of securing capital for

the mining company. These activities fall into three groups which will be discussed in order, viz:

(1) It has owned and held all the stock of Chile Exploration, received dividends thereon and voted this stock by proxy.

(2) During the first period it borrowed money by a bond issue, pledged the stock as security and during all four periods made advances from the proceeds for the capital purposes only of Chile Exploration.

(3) During the third and fourth periods it invested certain of the proceeds, temporarily on its hands pending their withdrawal by Chile Exploration, in call loans and Liberty bonds (R. 2-23).

The first group is characteristic of an inactive property owner. Owning and voting stock and receiving dividends certainly involve no "efforts in the pursuit of profits". The profits realized by the Company were solely the result of the continued efforts of Chile Exploration. In the hands of the Company, the profits were the mere fruit of stock ownership. In this aspect, the Company was an "intermediary" in exactly the same sense as the corporation holding title to premises occupied by a dry goods business and receiving and distributing rentals therefrom, in the case of *U. S.* v. *Emery, Bird, Thayer Co.*, 237 U. S. 28 (1915) (Government's Brief, p. 17). There was but one business enterprise, the mining and marketing of copper. The Company was a mere adjunct of this enterprise and was no more conducting the business than was the lessor corporation conducting the railroad business in *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295 (1913). Voting power, of course, went along with the stock as an incident to its ownership. The Commissioner of Internal Revenue has recognized the inactive status of a typical holding company:

> "Holding companies as distinguished from parent corporations * * * are not doing business" *Article* 13, *Regulation* 64, 1924 *Edition.*

This ruling is in harmony with the uniform decisions of the Federal courts that holding companies are not "carrying on or doing business".

U. S. v. *Nipissing Mines Company,* 206 Fed. 431 (1913, 2nd C. C. A.; writ of error dismissed on motion of U. S., 234 U. S. 765).

International Salt Co. v. *Phillips* (Dec. 10, 1925, 3rd C. C. A., unreported).

Three Forks Coal Co. v. *U. S.* (October 29, 1925, W. D. Pa., unreported).

Butterick Co. v. *United States,* 240 Fed. 539 (1917 S. D. N. Y.; writ of error dismissed on motion of U. S., 248 U. S. 587).

The Government is clearly in error if it means to contend that the Company is doing business because it has not "reduced" its activities and is still carrying out the purposes for which it was organized. The passage quoted (p. 19 of Government's Brief) from the *Sargent* case cannot be understood as laying down any such rule: so construed, the passage would by dictum overrule the case of *U. S.* v. *Emery Bird, Thayer Co., supra,* decided by a unanimous court two years previously, and cited with approval in the *Sargent* decision. The opinion in the *Emery, Bird, Thayer* case called express attention to the fact that the corporation there held not to be doing business was carrying out its characteristic charter functions without reduction in activities. It must be immaterial whether a corporation has *reduced* its activities to the mere ownership of property and acts incidental thereto, or has always *confined* its activities within those limits. The passage quoted in the Government's brief (p. 19) from the *Sargent* case should not be isolated from the sentence of the same paragraph immediately preceding it, which reads:

> "It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court."

In using the word "reduced" in the sentence next following the above, the Court undoubtedly had in mind the *facts* of earlier cases (*Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187 (1911); *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295 (1913)) where the corporations had at some time in their history abandoned active business pursuits of their own and become inactive property owners.

On this point, Judge Learned Hand in the case at bar said (R. 47):

> "It is quite true that this plaintiff has been doing all that it was organized to do, and that this feature constantly runs through the cases, as if it were in some sense a test of whether it was 'doing business' at all. Yet I cannot think that this would be a sound rule, or that it makes any difference whether the chartered powers are fully employed or not, because as Mr. Justice Holmes said in *U. S.* v. *Emery-Bird, Thayer Realty Co.*, 237 U. S. 28, the question is what it does and not what it can do. There would be no justification in treating two corporations differently who did exactly the same things merely because one had an extensive charter and the other did not."

Notwithstanding the clear holding of the *Emery-Bird, Thayer* case, the Government contends (Brief, p. 13) that corporations organized for the purpose of doing business, *and engaged in the activities for which organized* (italics ours), are doing business (an obvious proposition if taken literally); and cites three real estate corporation cases which were among those decided by this Court *sub nom. Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911), primarily on the constitutionality of the Act of 1909. Two of the cases, the *Park Realty Co.* and the *Clark Iron Co.*, came up on appeal from the trial courts which had sustained demurrers to bills in the nature of stockholders' suits to restrain payment of the tax. In the third, the *Broadway Realty Co.* case, there was an answer admitting the allegations of fact and denying unconstitutionality, and a decree on the pleadings dismissing the bill. The extremely meagre statement of facts given in the opinion

regarding the corporations in question and the summary method in which Mr. Justice Day disposes of the issue of "doing business" becomes more understandable when one examines the record.

The three bills were drawn solely to test the constitutionality of the Act and the pleader confined attention to this issue by averring, either expressly or in effect, that the corporation was subject to the tax. Thus, in the *Clark Iron Co.* case, the bill stated that the corporation was in the business of watching over and caring for certain lands, etc., and that it did *not* come within any of the classes of corporations excepted by the terms of the Act from payment of the tax. In the *Park Realty Co.* case, the bill alleged that the corporation was engaged in the management and leasing of a hotel and that it came within the terms and purview of the Act. In the *Broadway Realty Co.* case, the bill alleged that the corporation was engaged in the business of managing an office building, collecting rents therefrom, etc. Not only did the bills of complaint show affirmatively that the corporations were "carrying on or doing business" but no issue on this point and no contention to the contrary is made in the demurrers or the answer filed to the bills, or the decisions of the courts thereon, or the specifications of error or the briefs filed by either side upon appeal to this Court.

The Government also cites the *Flint* v. *Stone Tracy* case as holding that making investments constitutes doing business (Brief, p. 13). We do not so understand it. Only one of the seven cases mentioned on the issue of doing business in the *Flint* v. *Stone Tracy* decision contained any allegation in the bill of complaint regarding the making of investments, viz., *Phillips* v. *The Fifty Associates,* and here the fact appears only inferentially from the last clause of one sentence of the bill, as follows:

> "* * * nor is it so engaged at all except in so far as the doing of the same may be an incident to the management of its property or the investment of its funds".

It would have been necessary in any event to have held the Associates to be doing business for the bill alleged:

> "The business of said corporation so far as it may be called a business is the holding and *managing* of the property aforesaid (real estate, interests therein, and leaseholds thereof) and such business is transacted and conducted within the city of Boston * * *." (Italics ours.)

Mr. Justice Day does not single out the question of making investments, either as to that or as to any other case, but includes it as a part of the comprehensive statement of corporate activities quoted by the Government (Brief, p. 12). The *Flint* case cannot be regarded as holding anything whatever as to the making of investments since the issue of doing business was never presented so as to turn on that activity.

The *Flint* v. *Stone Tracy* decision on the issue of doing business should be held to mean at most only what this Court itself stated it to mean in the companion case of *Zonne* v. *Minneapolis Syndicate,* 220 U. S. 187, 190 (1911):

> "that corporations organized for profit under the laws of the State, authorized to *manage* and rent real estate, *and being so engaged,* are doing business within the meaning of the law and are therefore liable to the tax imposed". (Italics ours.)

The second activity of the Company—borrowing money by a bond issue and advancing the proceeds to Chile Exploration for capital purposes only—cannot be considered an "effort in pursuit of profit". No profit was expected from the borrowing of the money or the advancing of it to Chile Exploration. The Company borrowed the money at six per cent., plus discount and expenses incidental to the issue of bonds, and advanced the proceeds on open account to Chile Exploration at six per cent (R. 4, 5, 10, 15, 21, 26, 27).

This operation was not "carrying on business", for the object of business activities is profit. The fact that the Com-

pany pledged its credit in a large sum, without expectation or realization of profit, shows that the Company was a mere adjunct of the mining business. The Company did not even become the owner of the structures and property purchased with the borrowed funds (R. 5, 10, 15, 21). Is it conceivable that the realty corporation in the *Emery, Bird, Thayer* case would have been held doing business if as a part of its functions as an "intermediary" it had placed a mortgage upon the premises and had turned the proceeds over to the dry goods company for a new wing on the store? If such an act by a property owner is doing business, the constitutional limitation upon direct taxation and the distinction between direct taxes and excise taxes cease to have any but an academic interest. We shall cite under II, *infra*, decisions from four Circuit Courts of Appeals indicating the correctness of the holding below that the Company's issuing of bonds in aid of an enterprise the stock of which it owned did not constitute doing business.

The third activity of the Company—the investment of temporary funds in call loans and to some extent in Liberty bonds was not an "effort in the pursuit of profit" but was an incidental activity not expected to yield any profit and not yielding any. The Company was organized for the principal purpose of holding and pledging the stock of Chile Exploration. It was not organized for the purpose of being an investment company or of investing generally (R. 3, 8, 13, 19). It happened that in the latter two of the years in question, payments on bond subscriptions accumulated somewhat in advance of withdrawals by the operating company (R. 16, 22). It was necessary, as far as possible, to protect these temporary funds from impairment by the six per cent. interest charge on the bonds. The method of investing in call loans is a customary, well-understood means of handling funds which have to be kept liquid, and is a mere alternative to ordinary bank deposits. The details were all attended to by the banks (R. 16, 22). The net result of the loans, as well as of the purchase of Liberty bonds was still a loss to the

Company since the interest received was less than that paid on the bonds. If this function constituted an "effort", at least it was one from which no "profit" was expected and none made.

In every essential respect, this activity (and all the activities of the Company) is covered by the decision of this Court in *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295 (1913), where the maintenance of a "contingent fund" in the form of investments was held not doing business, this being as in our own case, purely incidental to the main purposes of the corporation. The distinction attempted to be drawn in the Government's brief (p. 17) between "maintaining" investments and investing funds on hand disappears entirely in the light of the facts stated in the dissenting opinion in the *Minehill* case, to the effect that the corporation there was engaged "in passing upon and choosing securities in which corporate funds are to be invested." This was of the same nature as the corresponding incidental activity in the case at bar. On this point, we submit that the decision of Judge Learned Hand in the case at bar was a correct application of the *Minehill* case. He said (R. 48):

> "As things are, the nearest approach to a separate business is the plaintiff's investment of its funds in call loans. That, however, falls quite within the rule in *McCoach* v. *Minehill Ry. Co., supra.*"

The *Minehill* case does not state the amount of funds invested but from the fact that the annual return was about $24,000 (228 U. S. 295, 299), the amount invested must have been $400,000 or more. The mere fact that the Company's invested funds were larger is no ground for a distinction. It should also be noted that the call loan totals stated by the Government (Brief, pp. 6, 7) are aggregate sums, arrived at by adding the total of all the loans made and repaid during the period in question. The maximum amount of such loans outstanding at any one time during the third period was $5,000,000 and the average during that period was $3,-

370,000. The maximum outstanding during the fourth period was $9,100,000 and the average for that period was $4,962,500 (R. 16, 22, 34, 40).

These are the corporation's activities as revealed by the Record and as considered in the courts below. The Government may well have entertained some doubt as to whether any one or all of these activities together constituted "continued efforts in the pursuit of profit" for the Government has enlarged upon them by inferences which on examination are not supported by the admitted facts.

The Government's brief (p. 20) states that the purpose of the Company's organization—

> "was to do all those things essential to the continued operation of Chile Exploration Company, because the latter company would otherwise have been unable to operate effectively".

Contrast this with the statement of the Record (R. 3, 8, 13, 19), viz.:

> "Plaintiff was * * * organized * * * for the principal purpose of holding the capital stock of said Chile Exploration Company and pledging such capital stock as security for bond issues * * *".

The Record shows that the Company had *nothing* to do with the *operation* of Chile Exploration. Chile Exploration owned the ore deposits, the mining plant, and refineries (R. 3, 5, 9, 10, 14, 15, 20, 21). The mining business was the business of Chile Exploration (R. 2, 8, 13, 19). Chile Exploration did not even employ the Company in connection with the marketing or purchasing end of the business (R. 4, 9, 14, 21). The Company's function was to *hold* stock and *pledge* that stock (R. 3, 8, 13, 19, 32, 38).

It is next stated (Brief, p. 20) that the Company "conducted negotiations" with regard to borrowing money, and "did all else necessary to make the bonds salable." These alleged activities are not in the Record. The Record is a *complete* enumeration of the Company's activities during the

periods in question (R. 3, 9, 14, 20), and the Government so admitted by its motion for judgment. Aside from this, unless the issuing of the bonds was itself doing business, it cannot be material that incidental steps in regard thereto were taken.

It is stated (Brief, p. 20) that the Company—

> "saw that the proceeds of the bonds were applied in accordance with the agreement,"

and that the Company was—

> "manager of the funds raised by the sale of the bonds and supervisor of the spending of the money."

This again is contrary to the Record which, so far as it bears on this issue, merely states that the Company agreed to and did furnish the trustee for bondholders statements showing the application of the proceeds to the purposes required by the trust agreement (R. 6, 10, 15, 22). The Company neither saw to the application of the proceeds of the bonds nor supervised the spending thereof. If we are to indulge in speculation as to the source of the statements which the Company furnished, it is at least as proper to suppose that they were compiled and prepared by Chile Exploration as that the Company prepared such statements on the basis of its own investigation, there being no mention of such activities by the Company in the Record. Apart from this, unless it be held that issuing the bonds was doing business, seeing that the proceeds were applied as directed in the trust agreement would hardly amount to doing it.

Three times in the brief of the Government, it is said that the Company furnished "working capital" to Chile Exploration Company (pp. 18, 21, 22). The Record states exactly the contrary, viz: that all the funds advanced to Chile Exploration Company were used for the acquisition of property *"properly chargeable to capital account"* (R. 5, 10, 15, 21). This was in accord with the stipulation of the trust agreement under which the bonds were issued (R. 4, 9, 13, 20).

Most important perhaps of the unfounded inferences is on pages 21 and 22, viz: that in substance the Company was carrying on the mining business through the agency of Chile Exploration, that the Company was—

> "arbiter of the necessities of its (Chile Exploration's) business".

The Government's brief even sets out in italics the statement that the Company furnished the money—

> "and directed the work of that money through the Exploration Company".

Here again in a vital particular, the Government is contradicted by the Record which contains no such activity (R. 3, 9, 14, 20). The Company did vote by proxy the stock of Chile Exploration and thereby elect its directors (R. 4, 9, 14, 21). Presumably, every holding company does the same. It is an act incidental to stock ownership. It by no means indicates that the operating company through its directors and officers does not manage its own affairs.

The Government admits that Chile Exploration was not technically the agent of the Company (Brief, p. 21). It errs in asserting that as a practical matter Chile Exploration was an agent of the Company. The mining business was the business of Chile Exploration and the Company was formed and availed of merely to procure additional capital (R. 2, 3, 8, 9, 13, 14, 19, 20, 32, 38). The Record shows affirmatively (since the complaint states no such activity) that the Company did *not* direct the work of the additional capital through Chile Exploration, and that it did *not* interfere in, direct or control the operations of the mining company. No such direction or control was presented for the consideration of the courts below.

The effort to make it appear that the Company was in the copper business through an agent has significance as showing that the Government realizes that only one business enterprise is involved in the case at bar, that the only efforts in the pursuit of profit shown by the Record were the efforts of that enterprise, and that the holding company must be brought into some closer connection with those efforts than

mere stock ownership in order to be considered doing business. Nothing in the Record, however, indicates that any more active relation existed.

The Government's brief (pp. 18, 22) seeks to emphasize the *number* of things which the Company did and the *amount* of money invested in call loans; but the important question is the *nature* of the activities—whether they were of the sort which are properly called "doing business". It is true, as the *Sargent* case points out (242 U. S. 503, 517), that no particular amount of business is required to bring the Company within the terms of the Act. No issue as to the amount of business, however, arises till it be found that the activities of the Company had such a purpose and such a degree of continuity as to constitute "business" at all.

Summarizing:

In so far as the Company was a property owner, receiving the avails of the stock of Chile Exploration and exercising rights purely incidental to such ownership such as voting the stock, the decisions of this Court make it plain that the Company was not doing business (*U. S.* v. *Emery, Bird, Thayer Co.*, *McCoach* v. *Minehill Ry. Co.*, and the language of the *Sargent* case, *supra*). We do not understand the Government to contend the contrary.

The second activity—issuing and selling bonds and advancing the proceeds to Chile Exploration for capital purposes—was not an effort in the pursuit of profit and was incidental to the ownership of the stock of the corporation conducting the business enterprise. Its effect has not been directly passed upon by this Court, and will be considered more at length in connection with the presentation under Point II following of the body of authority from the lower federal courts sustaining the position of the Company.

The effect of the third and only other activity of the Company appearing in the Record—the investment of temporary funds in call loans and Liberty Bonds—is settled as incidental to ownership and as not constituting "doing business" by the ruling of this Court in *McCoach* v. *Minehill Ry. Co.* (*supra*).

II.

The lower Federal courts have uniformly and correctly held that the issuance of bonds by inactive property-owning corporations in aid of operating companies does not constitute "carrying on or doing business".

During the first taxable period, January 1 to July 30, 1917, the Company authorized an issue of bonds to have a face value of $100,000,000, and issued a part of these bonds having a face value of $35,000,000 (R. 4, 5). Under the terms of the trust agreement (R. 26) the proceeds of the bonds, after repaying certain floating indebtedness existing at the date of issue, could be used only for the following purpose:

> "The acquisition, construction, or improvement (properly chargeable to capital account) after April 1, 1917, of property necessary or useful in connection with the mining, refining, or marketing of copper or copper ore derived from deposits in the Province of Antofagasta, Chile, which property upon acquisition or at the date of construction or improvement will belong to the exploration company or to a subsidiary company." (R. 4, 9, 13, 20.)

Advances were made to Chile Exploration as requested by it and when it needed funds for capital purposes (R. 6, 10, 15, 22). Such advances were used by Chile Exploration, in accordance with the foregoing provision of the trust agreement, solely for the acquisition of property "properly chargeable to capital account" (R. 5, 10, 15, 21). The courts below held that this issuing of bonds did not constitute a carrying on of business by the Company. In this holding they are supported by decisions of three other Circuit Courts of Appeals in railroad-lease cases.

During the years 1914-1917, the First, Second, Third and Sixth Circuit Courts of Appeals decided a series of cases of

the *McCoach* v. *Minehill Ry. Co.* type (*supra*), wherein railroad and public utility companies had leased their properties to operating companies. Thereafter, in addition to the receipt and distribution of rentals, the lessors had issued and sold bonds or stock and advanced the proceeds to their lessees for capital purposes such as the extension of the road or the purchase of new equipment. In these cases the decisions of this Court were carefully analyzed, and it was held without exception or dissent that the bond issues were an incident to the functions of the lessors as property owners and did not amount to engaging in business; and that, notwithstanding this additional activity, the cases fell within the doctrine of *McCoach* v. *Minehill Railway Co.*

In every essential respect the situation of the lessor corporations corresponds to that of the Company. In both, the bond-issuing corporation is fundamentally a property owner, deriving income in the form of rents or dividends not from its own activities but from those of another company. In both, bonds were issued in amounts and at times determined by the needs of the operating concern and upon its request. In neither situation was there any expectation of profit or realization thereof by the issuer. The proceeds were in all cases invested in property used by the active corporations, and thereafter, as before, the issuer remained a property owner, not an operator.

Only one distinction of any consequence can be drawn between these two situations, and that distinction would indicate that ours is an *a fortiori* case of not doing business. The interests of lessor and lessee railroads are often opposed and their ownership may be in different hands. Litigation is frequent between them. To a greater extent than a holding company such as respondent, they may be considered separate business units with separate purposes. In the case at bar, the identification in interest and ownership between the Company and Chile Exploration is complete. The Company is but an adjunct, an appurtenance of Chile Exploration, in the same sense that the company holding title

to the real estate was an adjunct of the dry goods company, in *U. S.* v. *Emery, Bird, Thayer Co.*, 237 U. S. 28 (1915).

The railroad cases cannot be distinguished on the ground that the lessors were originally organized to operate railroads and that a bond issue by them would in any event be a purely incidental function, whereas it was a direct part of the corporate purpose of the Company. The *Emery, Bird, Thayer* case (237 U. S. 28, 32), in rejecting an attempted distinction of this sort, held that:

> "The question is rather what the corporation is doing than what it could do."

In the case at bar, the Company *did* the same thing as the railroad lessors.

The Government's brief makes no attempt to distinguish these lessor cases. They are so numerous as to constitute a settled body of law. They should not be lightly disregarded. Their authority, and their interpretation of the decisions of this Court will be entirely discredited if this Court holds in the case at bar that the borrowing of funds by the bond issue of 1917 constitutes doing business.

We cite below only certain of these cases wherein the facts are clearly analogous to those of the case at bar. The activities of the lessors are indicated under each citation.

Public Service Ry. Co. v. *Herold*, 229 Fed. 902 (1916, 3rd C. C. A.).

Application to State Board for leave to issue bonds; issuance of bonds, in part to reimburse lessee, in part to refund maturing bonds; sale of stock and bonds by lessor and advancement of the proceeds to lessee.

Traction Companies v. *Collectors of Internal Revenue*, 223 Fed. 984 (1915, 6th C. C. A.).

Issue of treasury stock and of reserve bonds which were in the hands of a mortgage trustee, to pay for extensions

and betterments made by the lessees; joining in conveyance of real estate sold by lessee; investment of accumulated funds.

Anderson v. *Morris & E. R. Co.*, 216 Fed. 83 (1914, 2nd C. C. A.).

Issue of bonds of a face value of $1,400,000, part of a series of such bonds issued and delivered to the lessee for capital expenditures.

N. Y. C. & H. R. R. Co. v. *Gill*, 219 Fed. 184 (1915, 1st C. C. A.).

Issue of bonds to pay off additional loan required by the lessee, and exercise of power of eminent domain.

McCoach v. *Continental Passenger Ry. Co.*, 233 Fed. 976 (1916, 3rd C. C. A.).

Reduction of indebtedness by means of a sinking fund and renewing of bonded indebtedness by corporate action.

Other railroad-, or public utility-lease cases where the lessors were held not doing business, are cited below. Each of these cases involves some incidental activity, such as the purchase of new property, exercise of the power of eminent domain, sale of part or all of the property, making of improvements and betterments directly by the lessor, in pursuance of a term of the lease, preparation to pay mortgage indebtedness, etc.:

Lewellyn v. *Pittsburgh B. & L. E. R. Co.*, 222 Fed. 177 (1915, 3rd C. C. A.)

Jasper & E. Railway Co. v. *Walker*, 238 Fed. 533 (1917, 5th C. C. A.)

Miller v. *Snake River Valley R. Co.*, 223 Fed. 946 (1915, 9th C. C. A.)

State Line & S. R. Co. v. *Davis*, 228 Fed. 246 (1915, M. D. Pa.)

As stated on the basis of these decisions by Judge Learned Hand in his opinion in the case at bar:

> "Had this been a lease I think there could be no doubt. The different incidents of the plaintiff's activity have all been passed on. * * * Had the plaintiff leased its property to the Exploration Co., and thereafter done what it did, there can be no doubt that it would not have been liable to the tax" (R. 47, 48).

It should be noted further that there have been four decisions by the Federal courts, besides the case at bar, on the question of "doing business" under the Capital Stock Tax Acts. Two of these have involved holding companies and two, real estate-owning corporations. In each instance the company has been held not to have been doing business. The Government's brief (p. 24) admits that the facts of two of the cases were in some degree analogous to the case at bar, but it passes over these holdings like those of the railroad-lease cases with the single comment (p. 23) that they—

> "seem on their face to indicate a reluctance on the part of some of the courts to accept what the Government thinks is the meaning of the decisions of this Court . . ."

The asserted reluctance will not be found in the cases themselves. They are a studied attempt to apply the decisions of this Court. In common with Judge Learned Hand, in the case at bar, they interpret these decisions as not applying the term "carrying on or doing business" to corporations which do not strike out for their own profit but receive and transmit the fruits of another's efforts. This controlling characteristic has not been allowed to be obscured by the fact that the corporation in each holding-company case borrowed money and purchased bonds or stock of an operating company. The facts are outlined under the citations.

International Salt Co. v. *Phillips* (Dec. 10, 1925, 3d C. C. A., unreported)

A holding company, issuing its own bonds (3 F. (2d) 678, 681), borrowing money and endorsing notes of a subsidiary in large amounts, and from time to time purchasing bonds of another subsidiary (substantially every activity of the Chile Copper Co.). The Court made the following important statement:

> "The owning of stock, the receipt and distribution of dividends, the endorsing of the notes of a company whose stock it held, the purchase of bonds for retirement or sinking fund purposes, amount to no more than acts incidental to the ownership of property. They are not the positive, aggressive acts incidental to the active carrying on or doing business for gain but rather the receipt of the gains of business capitalized in ownership."

Three Forks Coal Co. v. *U. S.* (Oct. 29, 1925, W. D. Pa., unreported).

A holding company, purchasing shares of its subsidiary from time to time, selling a block of such shares, and borrowing money to pay interest, taxes and indebtedness.

Cannon v. *Elk Creek Lumber Co.,* 8 F. (2d) 996 (1925, 7th C. C. A.).

A corporation, organized to buy in specific real estate upon foreclosure and hold it; protecting and surveying it and attempting to make a sale.

Lane Timber Co. v. *Hynson,* 4 F. (2d) 666, (1925, 5th C. C. A.).

A corporation owning a tract of timberland and having agents who continually solicited a sale thereof.

III.

The capital stock tax laws are not to be construed so as to impose two taxes upon the carrying on or doing of business by a single enterprise.

Chile Exploration, which has at all times carried on the mining business and owned the physical property, has paid capital stock taxes during the years in question (R. 3, 9, 14, 20). If capital stock taxes are imposed upon the Chile Copper Company also, double taxation results, for the Company's principal asset is the stock of Chile Exploration and both taxes will therefore be measured by the same values (R. 27).

It is a general principle of the construction of statutes imposing taxes that the courts are reluctant to construe and apply a statute in such a manner as to impose double taxation. *Tennessee* v. *Whitworth*, 117 U. S. 129 (1886); *Matter of Cooley*, 186 N. Y. 220 (1906); *Bank of California* v. *Richardson*, 248 U. S. 476 (1919); *Crocker* v. *Malley*, 249 U. S. 223 (1919).

This Court held that the Corporation Excise Tax Law of 1909, similar in its nature to the capital stock tax, should not be construed so as to fall twice upon the same enterprise.

> "The Corporation Tax Law does not contemplate double taxation in respect of the same business."
>
> *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295, 304.

In the *Minehill* case, the 1909 Law did not so clearly result in double taxation since the excise was measured by net income and the lessee could deduct the rental as an expense, the tax on it being paid only by the lessor. It is natural to find that under the Acts of 1916 and 1918, where the tax is measured by the value of the capital stock, the Courts have been all the more reluctant to construe the Acts so as to impose double taxation.

In *International Salt Co.* v. *Phillips, supra,* the Third Circuit Court of Appeals says on this point:

> "Sensing the words (carrying on or doing business) in their common everyday meaning, we are of opinion that Congress, however it might treat the gains of this company as income, did not mean to place an excise tax on the capital stock of such a company as one 'carrying on or doing business.' Its purpose was to put an excise tax on the company really carrying on or doing business, in this case the subsidiary company—and not on the shareholder of the subsidiary who was in receipt of the profits arising from such acts carrying on or doing of business."

In *Three Forks Coal Co.* v. *United States, supra,* the Court cites *McCoach* v. *Minehill Railroad Company, United States* v. *Emery, Bird, Thayer Realty Co.* and *Von Baumbach* v. *Sargent Land Co.,* and says:

> "The thought underlying the cases cited, and a number of others not mentioned, is that two corporations are not to be taxed under the Act of Congress when but one business is carried on."

On this point Judge Learned Hand, in the opinion below, said:

> "But the excise does not exact a double tax for leave to do a single business, and the plaintiff was in substance no more than the personification of a part of the enterprise. Except for the separation of the corporate activities no one would suggest that the Exploration Co. was doing two businesses" (R. 48).

Double taxation inevitably results unless the holding company is held not to be doing business.

The construction of the phrase "carrying on or doing business", adopted by the courts below, is in accord with the further principle that statutes imposing taxes should be

construed against the Government and in favor of the taxpayer.

U. S. v. *Wigglesworth*, 2 Story, 368, 374;
U. S. v. *Isham*, 17 Wall. 496, 504 (1873);
Gould v. *Gould*, 245 U. S. 151, 153 (1917);
U. S. v. *Merriam*, 263 U. S. 179 (1923).

These general considerations support our contention that the Courts below were correct in holding that the Company was not carrying on or doing business during the four taxable periods involved.

Conclusion.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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